

Award No. 5785
Docket No. CL-5706

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Clerks' Agreement when on December 31, 1946, it abolished a regular position of Clerk, rate \$7.39 per day, at Sanborn, Iowa, that theretofore had been established as a position and filled pursuant to rules of Clerks' Agreement and by unilateral action transferred the work normally attached to the position of Clerk to be performed by other than employees embraced within the Scope Rule of our Agreement with the Carrier thus violating provisions thereof.

2. The position of clerk at Sanborn, Iowa, as it existed immediately preceding December 31, 1946, be reinstated.

3. Employees B. R. Tipp and M. G. Roberts be compensated for all loss suffered by them as a result of the abolishment of the position retroactive to December 31, 1946.

EMPLOYEES' STATEMENT OF FACTS: Prior to November 1, 1946 the Carrier maintained a station force at Sanborn, Iowa, consisting of the following:

Agent
2nd shift Telegrapher
3rd shift Telegrapher
Station Clerk—Position No. 611

On or about November 1, 1946 the Carrier augmented its station force by the employment of an additional Operator and concurrently therewith the personnel of the Station were:

Agent
1st shift Telegrapher
2nd shift Telegrapher
3rd shift Telegrapher
Station Clerk—Position No. 611

OPINION OF BOARD: The System Committee contends Carrier violated its agreement with the Clerks when, effective as of December 31, 1946, it abolished the position of clerk at Sanborn, Iowa, and assigned the work thereof to employees not covered by the Clerks' agreement. It asks that the position be reinstated and that two named employees be compensated for all loss suffered by them as a result thereof, retroactive to December 31, 1946.

Carrier claims this Division is without jurisdiction to dispose of this claim on its merits because it did not cause notice of claim to be given The Order of Railroad Telegraphers. This claim is based on its contention that Section 3, First (j) of The Railway Labor Act so requires. Based on this contention it asks that the claim be dismissed. The factual situation here present presents the same question as was presented in Award 5702 of this Division. Therein we fully considered the matter and disposed of it contrary to what Carrier here contends. It would serve no useful purpose to herein restate what was therein set forth. That Award is here controlling and we find Carrier's claim in this respect to be without merit.

On October 1, 1941, the station forces at Sanborn, Iowa, consisted of an Agent-Telegrapher, a second shift Telegrapher and a Station Helper. As of that date the position of Station Helper was reclassified as a Station Clerk. This continued to be the station force at Sanborn until November 1, 1946, when a Telegrapher was added, and was such on January 16, 1946, when the agreement executed by the parties on November 30, 1945, became effective. This agreement, so far as here material, contained the following provisions:

Rule 1(e)

"Positions within the scope of this agreement belong to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 55."

Rule 55

"This agreement shall be effective as of January 16, 1946 and shall supersede and be substituted for all rules or existing agreements, practices and working conditions (except those not in conflict with this agreement) and shall remain in full force and effect until it is changed as provided for in the Railway Labor Act as amended."

On December 31, 1946, because of a decrease in business, but without negotiating an agreement with the Organization in regard thereto, Carrier discontinued the position of General Clerk at Sanborn and assigned the duties thereof, which up to that date had been performed by the occupant thereof, to the Agent-Telegrapher and Telegraphers at Sanborn. These latter positions are not covered by the Clerks' agreement. As of March 20, 1949, the force at Sanborn was reduced to an Agent-Telegrapher and a Telegrapher and this is the present force as far as the record shows and is the same force as existed at this point prior to April 16, 1941, on which date the Station Helper position was established.

In determining the meaning of the foregoing provision quoted from Rule 1(e) Carrier asks us to consider the rule proposed by the Organization during negotiations preceding its adoption. If a rule is clear then the history of the negotiations leading up to its adoption should not be considered in determining its meaning for we are then limited to a consideration of the intention made manifest thereby as we do not have authority to rewrite or amend the rules or provisions of the Agreement itself. See Awards 2467, 4181, 4506, 5133 and 5430 of this Division. Of course, if the rule or provision agreed to can be said to be ambiguous, the opposite would be true.

Scope rules which cover classes of employees by referring to positions generally reserve to them all work usually and customarily performed by the occupants thereof at the time of the negotiation and execution of the agreement. In the case of Clerks' Agreement it has been held that it does not purport to reserve all clerical work to clerks. This is evidenced by the many awards of this Division recognizing certain qualifications thereof or exceptions thereto. However, clerks have the right to perform all clerical work in the absence of its falling within such qualifications or exceptions. See Awards 2334 and 3003 of this Division.

These exceptions and qualifications include the right of Telegraphers to perform it, although they cannot be detached from their post and be sent elsewhere to perform it nor can the work be brought to them. See Awards 636, 4288 and 4867 of this Division. Others include the ebb and flow principle which is applicable when the duties are incident and normal to a position not under the Clerks' Agreement. See Awards 931, 1314, 2334, 3211, 3735 and 5458 of this Division. But, as stated in Award 4559 of this Division, "., the parties can provide otherwise by their agreement." Under these and other awards of this Division the Carrier had the right to assign the remaining clerical duties of the position of General Clerk at Sanborn, Iowa, when it was abolished as of December 31, 1946, to the Agent-Telegrapher and Telegraphers unless the quoted provisions of the parties' agreement, effective January 16, 1946, prevented it from doing so.

The word positions, when used in connection with an agreement, has been properly defined by this Division as: "positions which are subject to the agreement are protected to the craft by the agreement, and since 'work' is the essence of a position such work which is the manifestation of the position and the identity of it is likewise protected to the craft." Award 1314 of this Division.

At the time the agreement containing the provisions hereinbefore quoted became effective on January 16, 1946, the station forces at Sanborn, Iowa, included that of a General Clerk and the work being done by the occupant of that position became subject thereto. The provisions quoted prohibited the Carrier from doing what it did as of December 31, 1946, in the manner in which it was done. Carrier was required to comply with these provisions of its agreement with the Clerks.

Under a comparable provision of a Clerks' Agreement this Division so held in its Award 3563. Therein it held: "The work being that of clerks, it could not be removed from the agreement except by agreement." Such is the effect of the provisions here which abrogated the Carrier's right to do so in the absence thereof. As stated in the foregoing Award: "The foregoing awards do not apply because of the express provisions contained in the confronting agreement to the effect that 'no position shall be removed from this agreement except by agreement.'"

Carrier suggests that the claim should not be allowed because of the delay in presenting it both on the property and, after carrier had finally denied it, to this Division. The claim was first presented on the property in July 1948, or over a year and a half after the position was abolished. Carrier says it finally denied the claim on June 17, 1951. The declaration of intent to lodge the dispute dated June 28, 1951 was filed with this Division on June 29, 1951. The Carrier cites no provision of the agreement relating thereto and there is none in The Railway Labor Act. See Award 1608 of this Division. If such limitation is desired with reference to when a claim must be filed on the property it must be done by agreement of the parties. If a limitation is desired within which a dispute must be lodged here, after final denial on the property, it can only be done by an amendment to The Railway Labor Act. In neither instance do we have authority to do so by awards.

We think Carrier violated the Agreement when, after December 31, 1946, it had the Agent-Telegrapher and Telegraphers at Sanborn, Iowa, per-

form the clerical duties there which, up to that date, had been performed by the Station Clerk. However, the fact that Carrier must assign this work to clerical employes under the Clerks' Agreement who are entitled thereto and have it performed by them does not necessarily mean that the position of Station Clerk must be restored. It is sufficient compliance with the Clerks' Agreement if the work be assigned to and performed by clerical employes entitled thereto. Nor is the claimant B. R. Tipp necessarily entitled to compensation for all loss suffered by him as a result of the position being abolished. His claim is necessarily limited to the extent of all loss suffered by him but under no circumstances can the amount he receives exceed the amount that would compensate for all work which the Agent-Telegrapher and Telegraphers performed since December 31, 1946, which had, immediately prior thereto, been performed by the occupant of the position of Station Clerk. To that extent the claim is allowed.

It appears from the record that Claimant M. G. Roberts is no longer in Carrier's service and that he has consequently forfeited his seniority rights. In view thereof his claim is denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the agreement.

AWARD

Claim sustained but only to the extent as set forth in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1952.

DISSENT TO AWARD 5785, DOCKET CL-5706

This Award, on the question of jurisdiction, relies entirely on Award 5702 by the same Referee. We refer to our dissent to that Award and by reference thereto adopt same as our dissent in this case.

After failing to dismiss the Claim by reason of lack of notice to parties whose interest is affected by this Award, the majority, which included Referee Wenke, then renders an Award sustaining the Claim. Error is compounded upon error.

Award 3563 is cited as having in the Clerks' Agreement a provision comparable to Scope Rule 1, here involved. But Docket CL-3542, which resulted in Award 3563, did not involve clerical work performed by telegraphers.

Award 615 and others that followed form the basic background for all subsequent Awards on this question, and have been cited with approval and as authority by Referees time and time again in their Awards.

By this dissent we do not undertake a complete discussion of either the jurisdictional question, or of the erroneous holdings in the Opinion. We have demonstrated the fact that the Award is void. It should be treated as such.

/s/ A. H. Jones

/s/ W. H. Castle

/s/ R. M. Butler

/s/ J. E. Kemp

/s/ C. P. Dugan